



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: AUGUST 26, 2022

IN THE MATTER OF:

Appeal Board No. 623030

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 623024, 623025 and 623026, the claimant appeals from the decisions of the Administrative Law Judge filed April 1, 2022, which sustained the initial determination holding the claimant ineligible to receive benefits, effective August 31, 2020 through January 31, 2021, on the basis that the claimant was not capable of work on two days in each of the weeks ending September 6, 2020 and January 3, 2021, as modified to be effective August 31, 2020 through January 3, 2021, on one day in each of the weeks ending September 6, 2020 and January 3, 2021; sustained the initial determination charging the claimant with an overpayment of \$435 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a) as modified to be \$326.25; and sustained the initial determination reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis

that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 623027, 623028 and 623029, the claimant appeals from the decisions of the Administrative Law Judge filed April 1, 2022, which sustained the initial determination holding the claimant ineligible to receive benefits, effective October 19, 2020 through December 27, 2020, on two days in each of the weeks ending October 25, 2020, November 29, 2020 and December 27, 2020, on the basis that the claimant was on a paid vacation or holiday period, as modified to be one day in each of these three weeks; sustained the initial determination charging the claimant with an overpayment of \$652.50 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102

(h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a) as modified to be \$326.25; and sustained the initial determination reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 623030, 6230231 and 623032, the claimant appeals from the decisions of the Administrative Law Judge filed April 1, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 23, 2020 through January 31, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$10,500 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$16,965 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a), and \$1,500 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** In the period of March 23, 2020 through January 31, 2021, the claimant worked for this employer as a driver of the employer's customers, using the employer's vehicles. Generally, he was paid \$20 per hour. When he was worked a holiday, he was paid \$30 per hour for that day. The claimant usually worked three 12-hour shifts in the employer's seven-day pay weeks, though he could work as many as 40 hours per week. He worked three days a week. Separate from this employment, the claimant also delivered food until March 2020, when he stopped due to the COVID-19 pandemic. The claimant then filed an original claim for benefits, effective March 9, 2020, and on June 2, 2020 he filed a claim for PUA benefits. He did not resume making food

deliveries until some point after January 31, 2021.

In each of the weeks between March 23, 2020 and January 17, 2021, the claimant worked three shifts of varying lengths on three separate days. He was paid between \$680 and \$800 in gross pay for each of these weeks.

In the week ending September 6, 2020, the claimant worked 24 hours. He was not sick in this week. Instead, in order to see a relative and to conserve his vacation time, he requested sick pay of 12 hours. His pay included gross \$240 sick pay.

In the week ending September 20, 2020, the claimant worked 12 hours, and in the week ending October 18, 2020, he worked 36 hours.

In the week ending October 25, 2020, the claimant worked 24 hours and was paid 12 hours vacation

pay at \$20 per hour at his request. In the week ending November 29, 2020, he worked 24 hours and he also worked Thanksgiving, November 26, 2020, for which he was paid 12 hours holiday pay at \$30 per hour. In the week ending December 27, 2020, he worked 24 hours and he also worked Christmas Day for which he was paid 12 hours holiday pay at \$30 per hour.

In the week ending January 3, 2021, the claimant worked 12 hours and he also worked New Year's Day for which he was paid 12 hours at \$30 per hour. He was not sick in this week. Instead, in order to conserve his vacation time, he requested sick pay for one shift, 12 hours, and this week's pay included gross \$240 sick pay.

In the weeks ending January 24, 2021 and January 31, 2021, the claimant worked 36 hours each week for which he was paid \$720 in gross pay each week.

On June 29, 2020, the claimant certified for benefits for the ten weeks from the week ending March 22, 2020 through the week ending May 24, 2020. For each week he stated he was eligible for benefits. By doing this, he was stating that he did not work any day, including self-employment. For each of the other weeks in this period from the week ending June 14, 2020 through the week ending January 17, 2021, the claimant was asked whether, including self-employment, he had worked last week. He always stated he did not work. For the weeks ending January 24, 2021 and January 31, 2021, the claimant was

asked, "Including self-employment, did you work last week?" Each week he stated he did not work. The questions did not state they related to a specific employment. The claimant did not speak to anyone from the Department of Labor regarding the weekly certifications.

In addition, as part of the weekly certifications for benefits, for the weeks ending October 25, 2020; November 29, 2020, and December 27, 2020, the claimant was asked if he had received or was due to receive any vacation pay for any day during the prior week and if he had received or was due holiday pay. He answered "No" to these questions. Also, as part of the weekly certifications for benefits, for the weeks ending September 6, 2020 and January 3, 2021, he was asked if he had been ready, willing and able to work every day during the prior week. He answered "Yes", indicating he was ready, willing and able to work each day during the prior week.

As a result of the certifications, the claimant received a total of \$29,617.50 in benefits as follows: \$10,500 in FPUC benefits; \$1,500 in LWA benefits; \$16,965 in PUA benefits and \$652.50 in PUA benefits. The LWA benefits were received for the weeks ending August 9, 2020 through September 6, 2020.

OPINION: Appeal Board Nos. 623024, 623025 AND 623026 (Capability)

Initially we note that the Administrative Law Judge in A.L.J. Case No. 022-05397 (filed April 1, 2020) decided that the claimant lacked capability for employment on only one instead of two days in each of the weeks ending September 6, 2020 and January 3, 2021. There was no appeal from that decision. We are bound by that decision holding that the claimant was capable of employment on one day each week.

The credible evidence establishes that the claimant was not sick in the weeks ending September 6, 2020 and January 3, 2021. We credit the claimant's unrefuted testimony that he requested sick pay in order to conserve his vacation time. We note that although the claimant initially testified that he was sick in the September week, and was sick with COVID around December 31, 2020, he later submitted proof that he had COVID in December 2021. Absent evidence establishing that he was, in fact, sick on these days, we conclude that the claimant was capable of employment on the one day each week which is before us. As a result, we conclude that the benefits the claimant received for one day in each week were not overpaid.

The credible evidence further establishes that for each of these two weeks, the claimant certified that he was ready, willing and able to work. As the claimant was not sick, but rather chose to use sick pay for his time off, he was capable of employment and his certifications for these two weeks are factually true

statements. Accordingly, with respect to the initial determination holding that the claimant was not capable of work, we conclude that these statements do not constitute willful misrepresentations.

Appeal Board Nos. 623027, 623028 AND 623029 (Eligibility during a paid vacation or holiday)

Initially we note that the Administrative Law Judge in A.L.J. Case Nos. 022-05383 and 022-05384 (filed April 1, 2020) decided that the claimant was ineligible because he had received vacation or holiday pay on only one day instead of two days in each of the weeks ending October 25, 2020, November 29, 2020 and December 27, 2020 and that overpayment was reduced from \$652.50 in PUA benefits to \$326.25. There was no appeal from these decisions. We are bound by these decisions holding that the claimant was not ineligible because he had received vacation or holiday pay on one day each week and that \$326.25 in PUA benefits was not overpaid.

The credible evidence establishes that in the week ending October 25, 2020, as he requested, the claimant was paid 12 hours vacation pay at \$20 per hour. Since the claimant worked shifts of 12 hours, the vacation pay he received was for one day. In the week ending November 29, 2020, he worked Thanksgiving, for which he was paid 12 hours holiday pay at \$30 per hour. In the week ending December 27, 2020, he worked Christmas Day for which he was paid 12 hours holiday pay at \$30 per hour. We have credited the claimant's contention that he worked on Christmas Day and on Thanksgiving because his rate of pay was higher than the vacation pay he received. Since the claimant worked on the two holidays, he earned the resulting pay, even though it was at a higher rate of pay. This is not holiday pay in lieu of working on a holiday. Accordingly, we conclude that due to receipt of vacation pay, the claimant is not eligible to receive benefits on one day in only the week ending October 25, 2020.

The credible evidence further establishes that the claimant received \$652.50 in PUA benefits. Pursuant to Section 2102 (h) of the CARES Act of 2020, the regulations at 20 CFR Section 625 covering Disaster Unemployment Assistance

(DUA) are also applicable to Pandemic Unemployment Assistance (PUA). Pursuant to 20 CFR Section 625.14 (a), individuals who receive PUA benefits to which they were not entitled are liable to repay the overpaid benefits regardless of whether the payment was due to the individual's fault or misrepresentation. Since the claimant was ineligible to receive benefits due to receipt of vacation pay on one day, he was not entitled to receive such benefits. Accordingly, consistent with federal law, this overpayment is recoverable. The amount of this overpayment is referred back to the Department of Labor for recalculation in accordance with this decision.

With respect to the issues of receipt of holiday and/or vacation pay, the credible evidence establishes that for the week ending October 25, 2020, the claimant certified that he did not receive vacation pay and that for each of the remaining two weeks, he stated he did not receive holiday pay. The statements that he did not receive holiday pay are accurate. However, the statement that he did not receive vacation pay in the week ending October 25, 2020 is factually false. The claimant has contended that he was certifying as to the lost work at his other employment. We are not persuaded because the certification question does not reference a specific employment. Since the claimant had to request vacation pay, he knew he received it in this week. Accordingly, we conclude that only the certification regarding vacation pay constitutes a willful misrepresentation.

The amount of the civil penalty is referred to the Department of Labor to be recalculated in accordance with this decision.

Appeal Board Nos. 623030, 623031 AND 623032 (Lack of total unemployment and/or earnings exceeded the statutory limitation)

The credible evidence establishes that in the period of March 23, 2020 through January 31, 2021, in total regarding the issues of whether the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, there are 41 weeks before us. The weeks ending May 31, June 7, August 2,

and September 13 of 2020 are not at issue. In seven of the weeks, including September 6, September 20, October 18, October 25, November 29, and December 27, 2020, as well as January 3, 2021, there is no contention regarding the earnings of the claimant. In each of the remaining 34 weeks of the period, the claimant worked at least 34 hours, and earned gross pay in excess of \$504.

In addition, the claimant lacked total unemployment on one day in the week ending September 20, 2020, when he worked 12 hours over one day and did not earn over \$504 for the week and for two days during the weeks ending September 6, October 25, and November 29, 2020. For the week ending January 3, 2021, the claimant was not totally unemployed on two days, as he worked 12 hours and he also worked New Year's Day that week. In addition, for the week ending December 27, 2020, he was not totally unemployed on three days during the week, as he worked Christmas Day in addition to working 24 hours over 2 days. The claimant worked three days in the week ending October 18, 2020, a week for which there has been no contention regarding his earnings.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 4702(h), "Day of Total

Unemployment," effective January 18, 2021, provides, in part: "(2) The total number of day(s) of employment in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of 10 are included per calendar day, dividing the total number of hours by 10, and rounding up to the nearest whole number."

The claimant worked 36 hours in each of the weeks ending January 24, 2021 and January 31, 2021.

Applying the law for the period beginning January 18, 2021, we find that the claimant worked three days in each of these weeks and earned more than \$504 in gross pay. Accordingly, because the claimant earned gross in excess of \$504 each week in the 32 weeks running through January 17, 2021 and in the two weeks beginning with January 18, 2021, we conclude that the claimant lacked total unemployment for the entire week in each of the 34 weeks in this total period of 41 weeks.

The credible evidence further establishes that the claimant received \$10,500 in FPUC benefits. In the weeks in which the claimant lacked total unemployment for four or more days and/or earned more than \$504 in gross pay during the week, he was not entitled to receive FPUC benefits. As the claimant was not eligible for even \$1 dollar of regular unemployment insurance benefits during those weeks, consistent with federal law, we conclude that this portion of the FPUC benefits are recoverable. With respect to the weeks ending September 6, September 20, October 18, October 25, November 29, December 27, 2020 and

January 3, 2021, weeks in which he was not totally unemployed for three days or less and did not earn more than \$504 in gross pay, the portion of the FPUC benefits received during weeks were not overpaid. The amount of this overpayment is referred to the Department of Labor to be recalculated in accordance with this decision.

The credible evidence establishes that the claimant received \$16,965 in PUA benefits. Pursuant to Section 2102 (h) of the CARES Act of 2020, the regulations at 20 CFR Section 625 covering Disaster Unemployment Assistance (DUA) are also applicable to Pandemic Unemployment Assistance (PUA). Pursuant to 20 CFR Section 625.14 (a), individuals who receive PUA benefits to which they were not entitled are liable to repay the overpaid benefits regardless of whether the payment was due to the individual's fault or misrepresentation. Since the claimant lacked total or partial unemployment, he was not entitled to receive such benefits. Accordingly, consistent with federal law, this overpayment is recoverable. The amount of this overpayment is referred back to the Department of Labor for recalculation in accordance with this decision.

The credible evidence establishes that the claimant received \$1,500 in LWA benefits. Since the claimant lacked total unemployment on the week ending August 9, 2020 through the week ending August 30, 2020, he was overpaid the LWA benefits associated with these weeks. LWA benefits are recoverable under 44 CFR § 206.120 (f)(5) because these benefits were paid in error. We note

that a claimant who is entitled to \$100 in regular unemployment insurance benefits in a week is not overpaid LWA benefits for that week. As the claimant was not totally unemployed for one day in the weeks ending September 20 and January 3, 2020, and for two days during the weeks ending September 6, October 25, November 29 and December 27, 2020, during

which the claimant did not earn more than \$504 in gross pay, the LWA overpayment is referred back to the Department of Labor for recalculation in accordance with this decision.

The credible evidence also establishes that for each of the 41 weeks at issue from March 23, 2020 through January 31, 2021, the claimant certified that he did not work. The claimant knew he was working. We are not persuaded by the contention that he was certifying for the lost food delivery work because he admitted that during the certifications, he was not asked for which employment he was certifying. We note that the claimant has not contended that he was



advised to falsely certify for benefits weekly. Accordingly, we conclude that each of the certifications' statements constitutes a willful misrepresentation to obtain benefits. As the claimant is subject to a recoverable overpayment and at least one willful misrepresentation, the claimant is subject to a civil penalty. The amount of the civil penalty is also referred to the Department of Labor to be recalculated in accordance with this decision.

DECISION: In Appeal Board Nos. 623024, 623025 and 623026, the decision of the Administrative Law Judge is reversed.

In Appeal Board Nos. 623024, 623025 and 623026, the initial determinations, holding the claimant ineligible to receive benefits, effective August 31, 2020 through January 31, 2021, on the basis that the claimant was not capable of work on two days in each of the weeks ending September 6, 2020 and January 3, 2021; charging the claimant with an overpayment of \$435 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a); and reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis that the claimant made willful misrepresentations to obtain benefits, are overruled.

In Appeal Board Nos. 623027, 623028 and 623029, the decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 623027, the initial determination, holding the claimant ineligible to receive benefits, effective October 19, 2020 through December 27, 2020, on two days in each of the weeks ending October 25, 2020, November 29, 2020 and December 27, 2020, on the basis that the claimant was on a paid vacation period, is modified to be one day in the week ending October 25, 2020, only, and, as so modified, is sustained.

In Appeal Board No. 623028, the initial determination, charging the claimant with an overpayment of \$652.50 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a), is modified in accordance with this decision and, as so modified, is sustained.

In Appeal Board No. 623029, the initial determination, reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified in accordance with this decision and, as so modified, is sustained.

In Appeal Board Nos. 623030, 623031 and 623032, the decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 623030, 623031 and 623032, the initial determination, holding the claimant ineligible to receive benefits, effective March 23, 2020 through January 31, 2021, on the basis that the claimant was not totally unemployed and/or had earnings that exceeded the statutory limitation, is modified in accordance with this decision and, as so modified, is sustained.

In Appeal Board No. 623031, the initial determination, charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$10,500 recoverable pursuant to Section

2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$16,965 in Pandemic Unemployment Assistance (PUA) benefits recoverable pursuant to Section 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR Section 625.14 (a), and \$1,500 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified in accordance with this decision and, as so modified, is sustained.

In Appeal Board No. 623032, the initial determination, reducing the claimant's right to receive future benefits by zero effective days and charging a civil penalty of \$4,217.62 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified in accordance with this decision and, as so modified, is sustained.

The amounts of the recoverable overpayments associated with the lack of total unemployment and vacation initial determinations are referred back to the Department of Labor for recalculation in accordance with this decision.

The amount of the civil penalty is referred back to the Department of Labor for recalculation in accordance with this decision.

The issue of whether the claimant lacked availability on any days in the weeks ending September 6, 2020 and January 3, 2021, is referred back to the Department of Labor for investigation and possible determination.

In Appeal Board Nos. 623027, 623028, 623029, 623030, 6230231 and 623032, the claimant is denied benefits with respect to the issues decided herein.

In Appeal Board Nos. 623024, 623025 and 623026, the claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER